

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.1.2006

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
and
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.310 of 2001

The Commissioner of Income Tax
Madras. .. Applicant

Vs

The Everest Litho Press
Thiruthangal Road
Sivakasi .. Respondent

PRAYER: Tax case reference at the instance of the Revenue against the order of the Income Tax Appellate Tribunal, Chennai dated 22.4.1997 in I.T.A.No.1698/Mds/1990 for the assessment year 1987-88. against order Appeal No. ITA NO. 382/88-89 Dated 26.02.1990 on the file of the Commissioner of Income Tax (Appeals) II Madurai against order in PAN - 0381/87-88/VNR I (1) dated 30.03.1988 on the file of the 1st Income-Tax Officer, Virudhunagar.

For Applicant : Mr.J.Narayanasamy
Junior Standing Counsel
for Income Tax
For Respondent : No appearance

JUDGMENT

(Delivered by P.P.S.JANARTHANA RAJA, J.)

At the instance of the Revenue, the Income Tax Tribunal has stated a case and referred the following question of law under Section 256(1) of the Income Tax Act:

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal erred in law in not holding that the amounts of sales-tax on printing receipts collected by the assessee formed part of the assessee's trading receipts in view of the ratio of the Supreme Court's decisions in the cases of Chowringhee Sales Bureau P. Ltd. (87 ITR 542),

Jonnalla Narasimarao & Co. and Others (220 ITR 588)
and Sinclair Murrey Co. P. Ltd. (97 ITR 615)?"

2. The relevant assessment year is 1987-88 and the corresponding accounting year ended on 9.9.1986. The respondent/assessee was carrying on printing work. The only point of dispute pertains to the inclusion of Rs.19,685/- representing the amounts collected towards sales-tax held by the assessee as contingent deposit. The Assessing Officer made addition under Section 43B of the Income Tax Act. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal to the Commissioner of Income Tax (Appeals), who accepted the contention of the assessee and allowed the appeal. Against the order of the Commissioner of Income Tax (Appeals), the Revenue appealed before the Tribunal. The Tribunal held that the assessee did not claim amount as deduction under Section 43B of the Act and held that Section 43B of the Act could not be applied to the present case and hence, confirmed the order of the Commissioner of Income Tax (Appeals).

3. The learned counsel for the Revenue contended that the assessee collected sales tax and did not deposit the same to the Sales Tax Department. On the other hand, the amount was shown as contingent deposit and the said amount was never paid to the Government and therefore, Section 43B of the Act has been rightly applied by the Assessing Officer. Despite service on the respondent/assessee there is no representation.

4. Section 43B of the Income Tax Act reads as follows:
"Section:43B - Certain deductions to be only on actual payment.-

Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of-

- (a) any sum payable by the assessee by way of tax or duty under any law for the time being in force, or
- (b) any sum payable by the assessee as an employer by way of contribution to any provident fund or superannuation fund or gratuity fund or other fund for the welfare of employees, shall be allowed (irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed him) only in computing the income referred to in Section 28 of that previous year in which such sum is actually paid by him.

5. A reading of Section 43B of the Act makes it clear that if tax having become payable is not paid by the assessee then alone Section 43B of the Act comes into operation. Section 43B of the Act was inserted with effect from April 1, 1984, to discourage taxpayers who did not discharge their statutory liability of payment of sales tax, excise duty, employer's contribution to provident fund, etc., for long periods of time, but claimed deductions in that regard from their income on the ground that the liability to pay these amounts had been incurred by them in the relevant previous year. After the insertion of section 43B, even if the assessee had regularly adopted the mercantile system of accounting, the amount of tax payable by the assessee could be deducted only in the year in which the sum was actually paid and not in the year in which the assessee incurred the liability to pay that tax.

6. In the case on hand, the amount collected as sales tax was never claimed as deduction by the assessee. Section 43B of the Act is not attracted at all when the assessee has not claimed any deduction of the amount collected by it. The Gauhati High Court, in the case of INDIA CARBON LTD. Vs. CIT, [1993] 200 ITR 758, considered a similar issue and held as follows:

"the amount of sales tax appeared on the liabilities side of the balance-sheet of the petitioner-company. The petitioner did not claim the added amount as deduction nor did he charge it to the profit and loss account. The amount of sales tax could not be added back to the income of the assessee under Section 43B. In the present case, the question was whether Section 43B applied and not whether sales tax collected formed part of the trading receipts."

7. In the instant case, the amount had been added by the Assessing Officer under Section 43B of the Act. All the authorities below had given a factual finding that the assessee never claimed deduction under Section 43B of the Act and therefore, Section 43B of the Act is not applicable.

8. The learned counsel appearing for the Revenue relied on the decision in COMMISSIONER OF INCOME TAX v. SOUTHERN EXPLOSIVES CO. [2000] 242 ITR 107. The issue in that case is whether sales-tax collected can be considered as a trading receipt or not. In the instant case, the issue is whether the addition can be made under Section 43B of the Act or not. The decision referred supra has no relevance and does not help the Revenue's contention. The

question of law raised by the Revenue deals only with the question whether sales tax collected but not paid would form part of the business or trading receipt. The question raised does not bring out the real controversy in issue. It does not deal with the real issue. It is well settled law that the jurisdiction of the High Court in a reference is in the nature of advisory jurisdiction and only such issues can be and are answered as arise properly on the facts and the questions referred to the High Court. The Revenue in the appeal did not bring about the real controversy in this case. In view of the above, we return the question referred to us unanswered. Further, we have also noticed that the tax effect in the present case is very negligible.
sasi

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

1. The Assistant Registrar,
Income-tax Appellate Tribunal,
Rajaji Bhavan, Besant Nagar,
Chennai (5 copies with records)
2. The Secretary, Central Board of Direct Taxes,
New Delhi (3 copies)
3. The Commissioner of Income-tax (Appeals)-II,
Madurai
4. The Commissioner of Income-tax,
Madras.
5. The Income Tax Officer
Virudhunagar.

+ one cc to M/s. Pushya Sitaraman, Advocate sr no. 3162

MAB(CO)
NM(07.03.2006)

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